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SENATE BILL

No. 178

Introduced by Senators Leno and Anderson

(Principal coauthor: Assembly Member Gatto)

**(Coauthors: Senators Cannella, Gaines, Hertzberg, Hill, McGuire,
Nielsen, and Roth)**

(Coauthors: Assembly Members Chiu, Dahle, Gordon, Maienschein,
Oberholte, Quirk, Ting, and Weber)

February 9, 2015

An act to add Chapter 3.6 (commencing with Section 1546) to Title 12 of Part 2 of the Penal Code, relating to privacy.

LEGISLATIVE COUNSEL'S DIGEST

SB 178, as amended, Leno. Privacy: electronic communications: search warrant.

(1) Existing law provides that a search warrant may only be issued upon probable cause, supported by affidavit, naming or describing the person to be searched or searched for, and particularly describing the property, thing, or things and the place to be searched. Existing law also states the grounds upon which a search warrant may be issued,

including, among other grounds, when the property or things to be seized consist of any item or constitute any evidence that tends to show a felony has been committed, or tends to show that a particular person has committed a felony, or when there is a warrant to arrest a person.

This bill would prohibit a government entity from compelling the production of or access to electronic communication information or electronic device information, as defined, without a search warrant, wiretap order, or order for electronic reader records, except for emergency situations, as defined. The bill would define a number of terms for those purposes, including, among others, “electronic communication information” and “electronic device information,” which the bill defines collectively as “electronic information.” The bill would require a search warrant for electronic information to ~~encompass no more information than is necessary to achieve the objective of the search~~ *describe with particularity the information to be seized* and would impose other conditions on the use of the search warrant or wiretap order and the information obtained, including ~~retention~~ *retention, sealing, and disclosure. The bill would require a warrant directed to a service provider to be accompanied by an order requiring the service provider to verify by affidavit the authenticity of electronic information that it produces, as specified. The bill would authorize a service provider to voluntarily disclose, when not otherwise prohibited by state or federal law, electronic communication information or subscriber information, and would require a government entity to destroy information so provided within 90 days, subject to specified exceptions.* The bill would, subject to exceptions, require a government entity that executes a search warrant pursuant to these provisions to contemporaneously provide notice, as specified, to the identified target, that informs the recipient that information about the recipient has been compelled or requested, and that states the nature of the government investigation under which the information is sought. The bill would authorize a delay of 90 days, subject to renewal, for providing the notice under specified conditions that constitute an emergency. The bill would require the notice to include a copy of the warrant or statement describing the emergency under which the notice was delayed. The bill would provide that any person in a trial, hearing, or proceeding may move to suppress any electronic information obtained or retained in violation of its provisions, according to specified procedures. The bill would provide that a California or foreign corporation, and its officers, employees, and agents, are not subject to any cause of action for providing records, information,

facilities, or assistance in accordance with the terms of a warrant, wiretap order, or other order issued pursuant to these provisions.

(2) The California Constitution provides for the Right to Truth in Evidence, which requires a $\frac{2}{3}$ vote of the Legislature to exclude any relevant evidence from any criminal proceeding, as specified.

Because this bill would exclude evidence obtained or retained in violation of its provisions in a criminal proceeding, it requires a $\frac{2}{3}$ vote of the Legislature.

Vote: $\frac{2}{3}$. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Chapter 3.6 (commencing with Section 1546) is
2 added to Title 12 of Part 2 of the Penal Code, to read:

3
4 CHAPTER 3.6. ELECTRONIC COMMUNICATIONS PRIVACY ACT
5

6 1546. For purposes of this chapter, the following definitions
7 apply:

8 (a) An “adverse result” means any of the following:

9 (1) Danger to the life or physical safety of an individual.

10 (2) Flight from prosecution.

11 (3) ~~Imminent destruction~~ *Destruction* of or tampering with
12 evidence.

13 (4) Intimidation of potential witnesses.

14 (5) Serious jeopardy to an investigation or undue delay of a
15 trial.

16 (b) “Authorized possessor” means the possessor of an electronic
17 device when that person is the owner of the device or has been
18 authorized to possess the device by the owner of the device.

19 (c) “Electronic communication” means the transfer of signs,
20 signals, writings, images, sounds, data, or intelligence of any nature
21 in whole or in part by a wire, radio, electromagnetic, photoelectric,
22 or photo-optical system.

23 (d) “Electronic communication information” means any
24 information about an electronic communication or the use of an
25 electronic communication service, including, but not limited to,
26 the contents, sender, recipients, format, or location of the sender
27 or recipients at any point during the communication, the time or

1 date the communication was created, sent, or received, or any
2 information pertaining to any individual or device participating in
3 the communication, including, but not limited to, an IP address.
4 Electronic communication information does not include subscriber
5 information as defined in this chapter.

6 (e) “Electronic communication service” means a service that
7 provides to its subscribers or users the ability to send or receive
8 electronic communications, including any service that acts as an
9 intermediary in the transmission of electronic communications, or
10 stores electronic communication information.

11 (f) “Electronic device” means a device that stores, generates,
12 or transmits information in electronic form.

13 (g) “Electronic device information” means any information
14 stored on or generated through the operation of an electronic
15 device, including the current and prior locations of the device.

16 (h) “Electronic information” means electronic communication
17 information or electronic device information.

18 (i) “Government entity” means a department or agency of the
19 state or a political subdivision thereof, or an individual acting for
20 or on behalf of the state or a political subdivision thereof.

21 (j) “Service provider” means a person or entity offering an
22 electronic communication service.

23 (k) “Specific consent” means consent provided directly to the
24 government entity seeking information, including, but not limited
25 to, when the government entity is the addressee or intended
26 recipient *or a member of the intended audience* of an electronic
27 communication.

28 (l) “Subscriber information” means the name, street address,
29 telephone number, email address, or similar contact information
30 provided by the subscriber to the provider to establish or maintain
31 an account or communication channel, a subscriber or account
32 number or identifier, the length of service, and the types of services
33 used by a user of or subscriber to a service provider.

34 1546.1. (a) Except as provided in this section, a government
35 entity shall not do any of the following:

36 (1) Compel the production of or access to electronic
37 communication information from a service provider.

38 (2) Compel the production of or access to electronic device
39 information from any person or entity other than the authorized
40 possessor of the device.

1 (3) Access electronic device information by means of physical
2 interaction or electronic communication with the electronic device.
3 *This section does not prohibit the intended recipient of an*
4 *electronic communication from voluntarily disclosing electronic*
5 *communication information concerning that communication to a*
6 *government entity.*

7 (b) A government entity may compel the production of or access
8 to electronic communication information from a service provider,
9 or compel the production of or access to electronic device
10 information from any person or entity other than the authorized
11 possessor of the device only under the following circumstances:

12 (1) Pursuant to a warrant issued pursuant to Chapter 3
13 (commencing with Section 1523) and subject to subdivision (d).

14 (2) Pursuant to a wiretap order issued pursuant to Chapter 1.4
15 (commencing with Section 629.50) of Title 15 of Part 1.

16 (3) Pursuant to an order for electronic reader records issued
17 pursuant to Section 1798.90 of the Civil Code.

18 (c) A government entity may access electronic device
19 information by means of physical interaction or electronic
20 communication with the device only as follows:

21 (1) Pursuant to a warrant issued pursuant to Chapter 3
22 (commencing with Section 1523) and subject to subdivision (d).

23 (2) Pursuant to a wiretap order issued pursuant to Chapter 1.4
24 (commencing with Section 629.50) of Title 15 of Part 1.

25 (3) With the specific consent of the authorized possessor of the
26 device.

27 (4) With the specific consent of the owner of the device, only
28 when the device has been reported as lost or stolen.

29 (5) If the government entity, in good faith, believes that an
30 emergency involving danger of death or serious physical injury to
31 any person requires access to the electronic device information.

32 (6) If the government entity, in good faith, believes the device
33 to be lost, stolen, or abandoned, provided that the entity shall only
34 access electronic device information in order to attempt to identify,
35 verify, or contact the owner or authorized possessor of the device.

36 (d) Any warrant for electronic information shall comply with
37 the following:

38 (1) The warrant shall ~~be limited to only that information~~
39 ~~necessary to achieve the objective of the warrant,~~ *describe with*
40 *particularity the information to be seized by specifying the time*

1 periods covered and, as appropriate and reasonable, the target
2 individuals or accounts, the applications or services covered, and
3 the types of information sought.

4 (2) *The warrant shall require that any information obtained*
5 *through the execution of the warrant that is unrelated to the*
6 *objective of the warrant shall be sealed and not subject to further*
7 *review, use, or disclosure without a court order. A court shall*
8 *issue such an order upon a finding that there is probable cause to*
9 *believe that the information is relevant to an active investigation,*
10 *or review, use, or disclosure is required by state or federal law.*

11 ~~(2)~~

12 (3) The warrant shall comply with all other provisions of
13 California and federal law, including any provisions prohibiting,
14 limiting, or imposing additional requirements on the use of search
15 warrants. *If directed to a service provider, the warrant shall be*
16 *accompanied by an order requiring the service provider to verify*
17 *the authenticity of electronic information that it produces by*
18 *providing an affidavit that complies with the requirements set forth*
19 *in Section 1561 of the Evidence Code. Admission of that*
20 *information into evidence shall be subject to Section 1562 of the*
21 *Evidence Code.*

22 (e) When issuing any warrant or order for electronic information,
23 or upon the petition from the target or recipient of the warrant or
24 order, a court may, at its discretion, do any or all of the following:

25 (1) Appoint a special master, as described in subdivision (d) of
26 Section 1524, charged with ensuring that only information
27 necessary to achieve the objective of the warrant or order is
28 produced or accessed.

29 (2) Require that any information obtained through the execution
30 of the warrant or order that is unrelated to the objective of the
31 warrant be destroyed as soon as feasible after ~~that determination~~
32 ~~is made~~; *the termination of the current investigation and any*
33 *related investigations or proceedings.*

34 (f) A service provider may ~~disclose, but shall not be required~~
35 ~~to disclose~~; *voluntarily disclose* electronic communication
36 information or subscriber information when that disclosure is not
37 otherwise prohibited by state or federal law.

38 (g) If a government entity receives electronic communication
39 information voluntarily provided pursuant to subdivision (f), it

1 shall destroy that information within 90 days unless ~~the one or~~
2 *more of the following circumstances apply:*

3 (1) *The entity has or obtains the specific consent of the sender*
4 *or recipient of the electronic communications about which*
5 *information was ~~disclosed or~~ disclosed.*

6 (2) *The entity obtains a court order authorizing the retention of*
7 *the information. A court shall issue a retention order upon a finding*
8 *that the conditions justifying the initial voluntary disclosure persist,*
9 *in which case the court shall authorize the retention of the*
10 *information only for so long as those conditions persist, or there*
11 *is probable cause to believe that the information constitutes*
12 *evidence that a crime has been committed.*

13 (3) *The entity reasonably believes that the information relates*
14 *to child pornography and the information is retained as part of a*
15 *multiagency database used in the investigation of child*
16 *pornography and related crimes.*

17 (h) If a government entity obtains electronic information
18 pursuant to an emergency involving danger of death or serious
19 physical injury to a person, that requires access to the electronic
20 information without delay, the entity shall, within three days after
21 obtaining the electronic information, file with the appropriate court
22 an application for a warrant or order authorizing obtaining the
23 electronic information or a motion seeking approval of the
24 emergency disclosures that shall set forth the facts giving rise to
25 ~~the emergency.~~ *emergency, and if applicable, a request supported*
26 *by a sworn affidavit for an order delaying notification under*
27 *paragraph (1) of subdivision (b) of Section 1546.2. The court shall*
28 *promptly rule on the application or motion and shall order the*
29 *immediate destruction of all information obtained, and immediate*
30 *notification pursuant to subdivision (a) of Section 1546.2 if such*
31 *notice has not already been given, upon a finding that the facts*
32 *did not give rise to an emergency or upon rejecting the warrant or*
33 *order application on any other ground.*

34 (i) This section does not limit the authority of a government
35 entity to use an administrative, grand jury, trial, or civil discovery
36 subpoena to do ~~either~~ *any* of the following:

37 (1) Require an originator, addressee, or intended recipient of
38 an electronic communication to disclose any electronic
39 communication information associated with that communication.

(2) Require an entity that provides electronic communications services to its officers, directors, employees, or agents for the purpose of carrying out their duties, to disclose electronic communication information associated with an electronic communication to or from an officer, director, employee, or agent of the entity.

(3) *Require a service provider to provide subscriber information.*

1546.2. (a) Except as otherwise provided in this section, any government entity that executes a warrant, or ~~requests~~ *obtains* electronic information in an emergency pursuant to Section 1546.1, shall ~~contemporaneously~~ serve upon, or deliver to by registered or first-class mail, electronic mail, or other means reasonably calculated to be effective, the identified targets of the warrant or emergency request, a notice that informs the recipient that information about the recipient has been compelled or requested, and states with reasonable specificity the nature of the government investigation under which the information is sought. The notice shall include a copy of the warrant or a written statement setting forth facts giving rise to the emergency. *The notice shall be provided contemporaneously with the execution of a warrant, or, in the case of an emergency, within three days after obtaining the electronic information.*

(b) (1) When a warrant is sought *or electronic information is obtained in an emergency* under Section 1546.1, the government entity may submit a request supported by a sworn affidavit for an order delaying notification and prohibiting any party providing information from notifying any other party that information has been sought. The court shall issue the order if the court determines that there is reason to believe that notification may have an adverse result, but only for the period of time that the court finds there is reason to believe that the notification may have that adverse result, and not to exceed 90 days.

(2) The court may grant extensions of the delay of up to 90 days each on the same grounds as provided in paragraph (1).

(3) Upon expiration of the period of delay of the notification, the government entity shall serve upon, or deliver to by registered or first-class mail, electronic mail, or other means reasonably calculated to be effective as specified by the court issuing the order authorizing delayed notification, the identified targets of the warrant, a document that includes the information described in

1 subdivision (a), a copy of all electronic information obtained or a
2 summary of that information, including, at a minimum, the number
3 and types of records disclosed, the date and time when the earliest
4 and latest records were created, and a statement of the grounds for
5 the court's determination to grant a delay in notifying the
6 individual.

7 (c) If there is no identified target of a warrant or emergency
8 request at the time of its issuance, the government entity shall
9 submit to the Department of Justice within three days of the
10 execution of the warrant or issuance of the request all of the
11 information required in subdivision (a). If an order delaying notice
12 is obtained pursuant to subdivision (b), the government entity shall
13 submit to the department upon the expiration of the period of delay
14 of the notification all of the information required in paragraph (3)
15 of subdivision (b). The department shall publish all those reports
16 on its Internet Web site within 90 days of receipt.

17 (d) Except as otherwise provided in this section, nothing in this
18 chapter shall prohibit or limit a service provider or any other party
19 from disclosing information about any request or demand for
20 electronic information.

21 1546.4. (a) Any person in a trial, hearing, or proceeding may
22 move to suppress any electronic information obtained or retained
23 in violation of the Fourth Amendment to the United States
24 Constitution or of this chapter. The motion shall be made,
25 determined, and be subject to review in accordance with the
26 procedures set forth in subdivisions (b) to (q), inclusive, of Section
27 1538.5.

28 (b) The Attorney General may commence a civil action to
29 compel any government entity to comply with the provisions of
30 this chapter.

31 (c) An individual whose information is targeted by a warrant,
32 order, or other legal process that is inconsistent with this chapter,
33 or the California Constitution or the United States Constitution,
34 or a service provider or any other recipient of the warrant, order,
35 or other legal process may petition the issuing court to void or
36 modify the warrant, order, or process, or to order the destruction
37 of any information obtained in violation of this chapter, or the
38 California Constitution, or the United States Constitution.

39 (d) A California or foreign corporation, and its officers,
40 employees, and agents, are not subject to any cause of action for

- 1 providing records, information, facilities, or assistance in
- 2 accordance with the terms of a warrant, court order, statutory
- 3 authorization, emergency certification, or wiretap order issued
- 4 pursuant to this chapter.

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